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Torts: Limitation of Doctrine of Attractive Nuisance in Kentucky to Persons Under 14 Years of Age

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rafts, logs, etc., and has in fact been used for that purpose, the public has an easement of navigation in it.[15] A creek susceptible, at certain periods of the year, of valuable use for the purpose of floating logs to market must be considered, to that extent, a navigable or floatable stream.[16] It is not essential that the navigable capacity of the stream should be continuous; it is sufficient if its periods of high water and navigable capacity continue a sufficient length of time to make it useful as a highway.[17] But a stream that is not capable, during freshets, unaided by artificial means, of floating saw logs, is not a public highway for that purpose.[18] And a stream may be navigable for the purpose of floating logs and timber to market, though it is not navigable for boats at ordinary stages of the river.[19] The Kentucky courts will take judicial notice of the navigable character of the Ohio River,[20] and of the Kentucky River,[21] but it cannot be assumed that such a stream as Straight Creek, in Bell County, is navigable, although courts might take judicial notice of the fact in regard to streams of more public importance.[22]

It appears, therefore, that the legal test of navigability of waters in Kentucky depends entirely upon the question involved. If it is a question of the title of riparian owners to the bed of the stream, the common law or tidal test of navigability is applied; if the question is one of the right of the public to navigate the stream, or the right of a governmental agency to improve it, as in the principal case, the test is whether the stream is navigable in fact. There appears to be no particular reason for the distinction, but on the other hand there seems to be no particular inconvenience resulting from it.

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TORTS: LIMITATION OF DOCTRINE OF ATTRACTIVE NUISANCE IN KENTUCKY TO PERSONS UNDER 14 YEARS OF AGE

In the case of Dennis' Administrator v. Kentucky and West Virginia Power Company[1] a boy, 16 years of age, who had climbed defendant's electric transmission tower in order to see a ball game on a

[15] Goodin's Exrs. v. Ky. Lumber Co., 90 Ky. 625, 12 Ky. Law Rep. 573, 14 S. W. 775 (1890); Floyd County v. Allen, 190 Ky. 532, 227 S. W. 994 (1921).

[16] Ford Lumber and Mfg. Co. v. McQueen, 14 Ky. Law Rep. 521 (Super. Ct. 1892).

[17] Murray v. Preston, 106 Ky. 561, 21 Ky. Law Rep. 72, 50 S. W. 1095 (1899).

[18] Banks v. Frazier, 111 Ky. 909, 23 Ky. Law Rep. 1197, 64 S. W. 983 (1901).

[19] Ireland v. Bowman, 130 Ky. 153, 113 S. W. 56, 17 Ann. Cas. 786 (1908).

[20] Bennett v. Bryan, 1 Ky. Law Rep. 274 (1880).

[21] Warner v. Ford Lumber and Mfg Co., 123 Ky. 103, 93 S. W. 650 (1906).

[22] Hoskins v. Archer, 6 Ky. Law Rep. 671 (1885).

nearby field was electrocuted. In that case there was no allegation that deceased was of subnormal mentality, and the court refused to apply the attractive nuisance doctrine saying that a normal 16-year-old boy was out of the class for whose benefit the doctrine was created.

The so-called "attractive nuisance" doctrine which is apparently an exception to the well-established rule that one owes no duty to a trespasser other than not to injure him by wanton and willful misconduct,[2] is founded upon the theory that one maintaining on his premises some contrivance both attractive and dangerous to children who are in the habit of playing upon or around such premises, owes a duty to exercise ordinary care for the protection of such indiscreet trespassers as are attracted by said object. It is clear that when a person arrives at such an age as would take him out of the class of indiscreet children he is no longer entitled to the benefit of the doctrine; unless it affirmatively appears that due to defective mental development, his mental age is such as to bring him within the protected class.

In L. & N. R. Co. v. Hutton,[3] the court held the doctrine not applicable to a boy 14 years, 7 months old, in the absence of any showing of subnormal mental development saying: "If an infant has arrived at the age (14 years) to render him presumptively responsible for his contributory negligence, he would likewise be responsible when that negligence was committed by him while trespassing upon the property of another, since if responsibility attaches to him on account of his contributory negligence when he is at a place where he has a right to be, it should also at least prima facie operate against him when he is at a place where he does not have the right to be."

In Columbus Mining Co. v. Napier's Administrator[4] a child 15 years old, a trespasser upon defendant's land, was overcome by gas and died in a driftmouth in which he was playing. There was some evidence that deceased did not possess ordinary intelligence. The court held that the presumption that a child of such age is outside the protected class is conclusive, and subscribed to the doctrine of the Alabama court in Central of Georgia R. Co. v. Robins.[5]

In Commonwealth v. Henderson's Guardian,[6] the court held that the rule requiring use of ordinary care in keeping explosives did not apply to trespassers except as to infants of tender years; and that the presumption favoring trespassing infants was inapplicable to a child 15 years of age, unless he was shown to be of subnormal mentality.

Thus the Kentucky Court seems to reason by analogy from the law as applicable to contributory negligence. Indeed the rule seems to

[1] 258 Ky. 106, 79 S. W. (2d) 377 (1935). But see 83 Ky. 119 (1885).
[2] 122 Ky. 369, 92 S. W. 330 (1906); 78 Ind. 323, 41 Am. Rep. 572 (1881); 35 Ga. App. 639, 134 S. E. 189 (1926).
[3] 220 Ky. 277, 295 S. W. 175 (1924).
[4] 239 Ky. 642, 40 S. W. (2d) 285 (1931).
[5] 209 Ala. 6, 95 So. 367, 36 A. L. R. 10 (1923).
[6] 245 Ky. 328, 53 S. W. (2d) 694 (1932).

be well established both generally[7] and in Kentucky[8] that between 7 and 14 years there is a presumption, which may be rebutted, that the child does not possess sufficient understanding and discretion to be guilty of contributory negligence and that when the child is over 14 the presumption is that he has capacity and understanding sufficient to constitute contributory negligence.

But it may be questioned whether the analogy is well taken. Apparently the only conclusion which could be drawn from the law as applicable to contributory negligence would be as to whether contributory negligence existed in the particular case, since one could possess sufficient discretion to be guilty of contributory negligence and still not necessarily have sufficient discretion to be without the attractive nuisance doctrine.

But the authorities upon the doctrine of attractive nuisance seem to be almost unanimously in accord with the opinions herein expressed that presumptively it does not apply to persons over 14 years of age.[9] One case has been found supporting a contrary view,[10] but that case was somewhat peculiar on its facts.

In addition the legislature by certain statutes gives evidence that an infant of 14 has presumptively passed beyond the age of youthful indiscretion. By statute[11] he may choose his own guardian after reaching that age and may be employed in certain vocations.[12] Moreover a female may enter into the marriage relation upon reaching such age.[13]

In conclusion it is submitted that the law in Kentucky is as follows:

1. Between ages of 7 and 14, there is a prima facie presumption that the infant is within the doctrine.

2. 14 years or over, the presumption is that an infant is without the class of the doctrine.

3. 15 years and over the presumption of inability to come within the terms of the doctrine is conclusive.

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[7] 153 Ala. 192, 45 So. 198 (1907); 141 N. C. 300, 53 S. E. 891 (1906); 80 Wash. 196, 141 Pac. 340 (1914).

[8] U. S. Natural Gas Co. v. Hicks, 134 Ky. 12, 119 S. W. 166 (1909).

[9] Barnhill's Admr. v. Mt. Morgan Coal Co., 215 Fed. 608 (1910); Briscoe v. Henderson Lighting & Power Co., 148 N. C. 396, 62 S. E. 600 (1908); Central of Georgia R. Co. v. Robins, 209 Ala. 6, 95 So. 367, 36 A. L. R. 10 (1923); Devine v. Armour & Co., 159 Ill. App. 74 (1910); Hanna v. Iowa C. R. Co., 129 Ill. App. 134 (1906); Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 (1911); Pollard v. Okla. City R. R. Co., 36 Okla. 96, 128 Pac. 300 (1912).

[10] 60 Kan. 217, 56 Pac. 4 (1899).

[11] K. S., Sec. 2022.

[12] K. S., Sec. 331a-1.

[13] K. S., Sec. 2097.